

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 183 OF 2006

Ramnath Hiraji Pathare,	]	
residing at Flat No. 1 and 3,	]	
Smarth Niwas, C.S. No. 357,	]	]
Parel Village, Mumbai 400 012	]	...Applicant

V/s.

M/s. Aawas Builders,	]	
a partnership firm, having its	]	
office at Sagar, Near Bldg. No. 68,	]	]
Gandhi Nagar, Bandra (East),	]	
Mumbai 400 051 (through its	]	
partner Mr. Suresh G. Parab)	]	...Respondent.

Mr. A.J. Panicker for the Applicant

Mr. H. Toor i/by Mr. N.R. Gandhi for the Respondent.

CORAM: SWATANTER KUMAR, C.J.

JUDGMENT RESERVED ON: APRIL 13, 2007

JUDGMENT PRONOUNCED ON: APRIL 19, 2007

JUDGMENT:-

1. To this application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the respondent has raised the following objections:-

(a) The application, as framed, is barred by time. Thus, there cannot be any reference;

(b) The Arbitration Agreement between the parties is incapable of performance and is hit by the provisions of Sections 29 and 56 of the Indian Contract Act, 1872;

(c) The Agreement itself, being void, is incapable of having the basis of Court directions;

(d) And, lastly, there are no referable disputes.

2. The facts necessary for determining the merit or otherwise of these contentions are that the applicant, along with his wife, was owner of a plot admeasuring 178 square metres, situated at Survey No. 357, 40E, Parel Village, Mumbai. The respondent, a partnership concern, through its partner Mr. Suresh G. Parab, carrying on the business of a builder, approached the applicant with a proposal to develop the said land. They took forcible possession of the premises in June, 2002, without signing any agreement. Subsequently, the developer brought an Agreement, which was signed by the applicant on 22nd October, 2002. Under the Agreement of Development, the applicant was to be provided with a flat

admeasuring 800 square feet carpet area, on his bearing the construction cost of Rs.1250/- per square foot of carpet area. Clause 21 of the said Agreement contained an arbitration clause; and provided that the reference of disputes would be made to the Sole Arbitrator in accordance with the provisions of the Act. It is the case of the applicant that the respondent retained the original document and gave only a xerox copy to the applicant. As per the understandings between the parties, the possession of the property was to be handed over on 30th June, 2003, which was not done; and, in fact, the property itself was not developed in accordance with the terms of the Agreement by the builder. Though the applicant made a total payment of Rs.7,55,000/- to the respondent, in the hope that the respondent would complete the work, but he failed to do so. Besides this, the applicant paid to M/s. Swastic Constructions a sum of Rs.50,000/- on 25th January, 2006 for completing the work left in the flat. The Completion Certificate was not obtained despite repeated requests. The matter was even taken to the Police and the applicant even there, to show his *bona fides*, gave three cheques for equal sum of Rs.50,000/- each payable on 5th April, 5th May, and 5th June, 2006, to the

respondent to complete the amenities and obtain Occupation Certificate. Despite all this, the respondent did not complete the work; and, therefore, the applicant claimed refund of the amount. It is also the case of the applicant that the carpet area of the flat was also less, i.e., 760 square feet, instead of 800.

3. The applicant raised various claims which are contained in the letter and the legal notice dated 2nd May, 2006 (Exhibit 'E' to the application) and paragraph 20 of the application. Having invoked the Arbitration Clause, the applicant appointed the Sole Arbitrator Shri M.P. Rao, a Counsel of the High Court, but the respondent did not reply thereto, thus compelling the applicant to file the present application.
4. The objections to the application are raised by the respondent primarily on question of law, as noticed above.
5. As far as the question of limitation is concerned, the learned counsel appearing for the respondent relies upon paragraphs 4, 7 and 21 of the application; and contended that the cause of action had arisen on 3rd June, 2003, while the present

application has been filed in September, 2006; and as such, the application and the claims are barred by time. This contention of the learned counsel appearing for the respondent is misconceived on facts and law both. The Agreement between the parties was executed on 22nd October, 2002 and the possession of the property was to be given on 30th June, 2003. This possession was not handed over, and there had been serious disputes between the parties right thereafter. The payments were made by the applicant at different intervals and even before the Police in the month of May, 2006 when the parties met, it is specifically averred that the matter was amicably settled and terms were agreed, a sum of Rs.1,50,000/- by means of post-dated cheques was paid and it was agreed that all amenities, including the water and electricity connections, would be provided by the respondent to the applicant. Thereafter, again, the parties were not satisfied, and have raised various disputes. There is no document on record filed by the respondent to show that the possession of the property in question was handed over to the applicant at any given point of time, even till today. According to the applicant,

he had to engage another contractor to complete the work of amenities and spend a lot of money.

6. There is no specific denial to these averments in the pleadings of the parties. The fact remains that it was a recurring cause of action; and to that extent, even a continued cause of action. According to the applicant, the respondent failed to discharge its obligations and never fulfilled the same at any point of time so as to complete the cause of action. The respondent started construction, did not give possession in time and when the applicant entered into the building, there were number of deficiencies, including shortage of area. These might be disputed questions of facts on merits of the case. The Court can reject the application as time-barred only upon taking the application to be correct as filed. To succeed on the plea of demur, the respondent has to show that on the bare reading of the application, it is hit by limitation. Neither the plea is barred by time, nor the application. However, the Arbitrator can always look into these questions, and decide them on merits.

7. Learned counsel appearing for the applicant has placed reliance upon a judgment of this Court in the case of *Madhuvihar Co-op. Hsg. Soc. Ltd. & Ors. V/s. M/s. Jayantilal Investments & Ors.*[2006 (2) ALL MR 726] to argue that such things cannot be treated as barred by time. He relies upon the following paragraphs of the judgment:-

“46. Shri. Thorat submitted that the trial Court has wrongly decided the issue of limitation. According to Shri. Thorat the possession of the flats was delivered to the flat purchasers in 1989, the society was registered in the year 1993, whereas the suit has been instituted in the year 1997, as such even under the residual article 113 of the Limitation Act the suit is barred by limitation.

47. On the other hand according to Shri. Ghelani by way of this suit the society wants to seek mandatory injunction against the promoter to abide by the statutory obligations cast on him by MOFA (Maharashtra Ownership of Flats Act, 1963). Since the promoter has avoided to convey title and to execute necessary documents in favour of the society, there is a breach of statutory obligation which gives continuing cause of action to the society against the promoter and as such there is no question of the suit having been barred by limitation. I fully endorse the contentions made by Shri. Ghelani and hold that the suit is not barred by limitation.

...

49. It was urged by Shri. Ghelani that the trial Judge should not have granted three years time to the promoter for conveying title and for executing necessary documents in favour of the society, because as per the statute

conveyance of title and execution of the documents is to be effected within 4 months from the date of registration of the society. The period of 4 months has elapsed long back and there was no justification on the part of the learned trial Judge to grant 3 years for that purpose. I find considerable force in the submission. It may be noted that the learned trial Judge has not assigned any reason as to why three years time was needed for conveying title and executing necessary documents by the promoter in favour of the society. The learned trial Judge could have directed the promoter to convey title and to execute necessary documents in favour of the society forthwith."

8. There is no reason why the above reasoning cannot be applied to the facts of the present case. The limitation when starts running, it does not stop, but a continuing or referring cause of action would prolong the period of limitation, in the sense that the claim would not become barred by time. In the present case, handing over of possession, complete in all respects in terms of the Agreement, would be a complete cause of action, which stage, as per the applicant, never arose.
9. While relying upon Sections 29 and 56 of the Indian Contract Act, 1872, the learned counsel further argued that the Arbitration Agreement between the parties is void, as it is incapable of performance and requires an act impossible to do.

According to him, the arbitration clause, on the other hand, requires reference of dispute to a Sole Arbitrator under the provisions of the Arbitration Act, 1940, and at the same time, provides that arbitration proceedings shall be governed by the Act of 1996. The contention is that there is patent conflict and remedy under both the Acts cannot be invoked. This argument, again, is without any merit. Firstly, the Supreme Court, in the case of *Milkfood Ltd. V/s. GMC Ice Cream (P) Ltd.* [(2004) 7 Supreme Court Cases 288], clearly held that where an Arbitrator is appointed without the intervention of the Court, proceeding commences from the date of service of notice; and if such act was done prior to the 1996 Act, the provisions of the old Act may be applicable. Further, commencement of arbitration proceedings would be different from commencement of proceedings before an Arbitrator. The Court emphasized that even if there was conflict between the Law of Contract and the Law of Arbitral Procedure up to the date of commencement of arbitration proceedings, the Law of Contract must govern, and the Law of Procedure will only govern thereafter.

It is equally true that so as to coming into force of the provisions of the 1996 Act, the parties, by consent, could continue the proceedings under the old Act; and such proceedings would not be, in any manner, in conflict with the provisions of the new Act.

In view of this principle, the contention raised on behalf of the respondent is, again, misconceived. Firstly, neither of the acts contemplated in Clause 21 of the Agreement between the parties is capable of performance. The earlier part of the clause, in fact, requires parties to appoint 'a Sole Arbitrator', which completes the applicant's claim applicable under both the Acts, while the latter part of the clause provides for the procedure to be adopted in the arbitration proceedings; and requires that arbitral proceedings will be controlled by the 1996 Act. We are unable to see any conflict, much less the clause being void, being incapable of performance. The respondent, in any case, can hardly take an advantage of this argument, as it has failed to act in accordance with the provisions of the Agreement between the parties; and

now, has taken a stand before the Court, which is primarily untenable.

10. I find no merit in the contentions raised on behalf of the respondent, and allow this application. As the respondent has failed to act despite notice, it is necessary for the Court to appoint Sole Arbitrator in terms of Clause 21 of the Agreement between the parties. I hereby appoint Shri [U.D.Malvankar](#), retired City Civil Court Judge, Bombay, as the Sole Arbitrator. The arbitration proceedings may be concluded expeditiously.

CHIEF JUSTICE.